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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ATKINSON DREDGING COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Atkinson Dredging Company petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit entered in this case on February 24, 1964.

OPINIONS BELOW

The decision of the Court of Appeals (App. A, *infra*, p. 1a) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Re-

lations Board in the unfair labor practice case (TR. Vol. 1, pp. 1-15)[1] are reported at 141 NLRB No. 117. The opinion of the National Labor Relations Board in the representation case (TR. Vol. 1, p. 91) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1964 (App. A, *infra*, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act as amended, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether laid-off or former employees are entitled to vote in an union representation election within the "reasonable expectation for reemployment" doctrine notwithstanding the fact that their employment was sporadic with the employer as well as with other employers in the industry, and dependent upon the employer obtaining specific contracts.

2. Whether the Court of Appeals erred in ruling that there was substantial evidence on the whole record to support the Board's decision.

STATEMENT

The petitioner, Atkinson Dredging Company, is engaged in the marine construction and land reclamation business with its main yard and office at Great Bridge, Virginia. It also has a facility at Wilmington, North Carolina. The petitioner operates three dredges, the Enterprise, the Hampton Roads and the North Wood.

[1] "TR." refers to the transcript of record of the Court of Appeals printed in two volumes.

The respondent hires unskilled workmen to perform work on specific dredging jobs (TR. Vol. 1, 145-146, 318-320) and the number of employees of the petitioner has varied according to its success in obtaining new contracts (TR. Vol. 1, 142). There are no seniority rules determining employment of prior employees, and the petitioner, more often than not, will hire local employees at the site of the dredging job to work in these unskilled positions. (TR. Vol. 1, 145-146, 285, 286-287, 320, 366).

The unskilled workmen drifted from one company to another depending upon whether a dredging company had received a contract for a specific job and work was available. Many worked more frequently for other firms than for Atkinson. (TR. Vol. 1, 154-159, 161, 179, 181).

On April 6, 1961, the National Labor Relations Board directed a representation election among petitioner's employees employed during the payroll period ending April 1, 1961. The election was held on May 4, 1961, and thirty-five men voted.[2] Twenty-two of the ballots were challenged, and of the remaining thirteen unchallenged ballots five voted for the union[3] and eight voted against it. Inasmuch as the challenged ballots could affect the result of the election, the Regional Director of the NLRB, after an investigation, directed a hearing on the challenges.

The hearing was held on September 19 and 26, 1961, and on October 27, 1961, the hearing officer recom-

[2] The number of unskilled employees of respondent ranged from zero to about one hundred. (Tr. Vol. 1, 142)

[3] International Union of Operating Engineers, Local Union 25, Marine Division, AFL-CIO.

mended to the Board that eight challenges be sustained and that fourteen be overruled.

Petitioner filed exceptions to the recommendations that the challenges to ten ballots[4] be overruled.

Of these ten, petitioner contended that one had been injured prior to the eligibility date, and had not returned to work, but instead sought employment elsewhere.[5] Petitioner contended that two others were not employed either on April 1, the eligibility date, or on May 4, the date of the election.[6] At the time of the election one of these voters had obtained full time employment elsewhere at a higher rate of pay.[7] Petitioner contended in its exceptions that the other seven had terminated their employment prior to the election and had no reasonable expectancy of reemployment at a reasonable time in the future.[8] Of these seven, one had regular full time employment elsewhere at the time of the election,[9] and five obtained regular employment elsewhere within two weeks to a month after their jobs

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[4] Berkley Gillikin, Leon T. Rose, Walton Gillikin, R. D. Sellers, Hugh Brown, Willie Brown, Donnie Gillikin, Hampton Leonard, Eldred Robinson, and C. R. Dixon, Jr.

[5] Walton Gillikin.

[6] Berkley Gillikin and Leon T. Rose.

[7] Berkley Gillikin.

[8] R. D. Sellers, Hugh Brown, Willie Brown, Donnie Gillikin, Hampton Leonard, Eldred Robinson, and C. R. Dixon, Jr. Petitioner did not file exceptions to the Hearing Officer's recommendations that the ballots of Ellis Fulford, Jabie Fulford, Luther Grissett and Walter Corbett be counted. (Tr. Vol. 1, 90)

[9] R. D. Sellers. As stated above, Berkley Gillikin also occupies this category of regular full time employment elsewhere at the time of the election.

were completed, with the petitioner.[10] Of the eight challenged ballots which were sustained, the petitioner was in agreement with the Hearing Officer's recommendation on seven of them,[11] and of this category filed exception only on the recommendation pertaining to Floyd Hewitt.[12]

The Board denied the petitioner's request for oral argument on its exceptions, and in its Supplemental Decision and Direction issued on April 11, 1962, directed that fifteen of the challenged ballots should be opened and counted.[13] At the opening of the challenged ballots on April 19, 1962, petitioner requested that the Regional Director segregate the counting of the challenged ballots in order to preserve its position that the challenges did not fall within the same category.[14] This was denied and the ballots were mingled. The challenged ballots changed the result of the election in favor of the union, fifteen to thirteen. The petitioner filed objections to the conduct of the election and conduct affecting the result of the election and the

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[10] Walton Gillikin, Hugh Brown, Willie Brown, Donnie Gillikin, Hampton Leonard.

[11] Gaither Bevinson (Brinson), Terry Gillikin, Bert Robinson, Graham Smith, Junior L. Smith, Bobby Gillikin and Jerry Harrelson.

[12] Hewitt was reemployed about a week before the election. (Tr. Vol. 1, 75, 92.)

[13] The Board agreed with respondent that Hewitt's ballot should be counted. Hewitt did not testify at the hearing.

[14] (a) Those employees whose employment had been terminated prior to the date of eligibility, (b) employees who were employed on eligibility date but whose employment terminated prior to the date of the election, (c) employees who were employed both on the eligibility date and date of election but some of whose names because of clerical error did not appear on the eligibility list.

counting of challenged ballots. (TR. Vol. 1, 103-104). On May 8, 1962, the Regional Director recommended that the objections be overruled, and again the petitioner appealed to the Board by filing exceptions. Again, its request for oral argument was denied (TR. Vol. 1, 113), and on July 16, 1962, the Board in a Second Decision and Certification of Representation certified the union.

When the union attempted to bargain with the petitioner, the petitioner refused to do so in accordance with the established procedure to obtain judicial review of the representation case.

The respondent was cited for an unfair labor practice, and at the hearing held on December 13, 1962, attempted to introduce evidence to support its position that the certification of the union was invalid. *This offer of proof was denied* and the trial examiner held that the union had been properly certified. The case came before the Court of Appeals for the Fourth Circuit upon petition of the Board for enforcement of its order issued against this petitioner on April 15, 1963.

The Court below held that there was substantial evidence on the whole record to support the Board's determination. In doing so it stated:

> "In the Board's decision and order of April 15, 1963, in the complaint case, the prior certification was considered and reaffirmed. Thus in ruling that Respondent [Petitioner] had committed an unfair labor practice the Board necessarily found that no ineligible former employees had voted in the representation election of May 4, 1961." (Appendix A, *infra*, p. 4a) (Brackets added).

In discussing the applicable case law, the Court below stated:

> "The Fourth Circuit has upheld Board decisions which permitted unemployed seasonal employees to vote where they "had at time of the election a reasonable expectation of reemployment within a reasonable time in the future". *N.L.R.B.* v. *Jesse Jones Sausage Co.*, 309 F. 2d 664, 665 (4 Cir. 1962) Respondent [Petitioner herein] would have us give too narrow an interpretation to the *Jesse Jones Sausage* case and limit its application to seasonal industries where employees have a reasonable expectation of reemployment at a specific time in the future. There is nothing in the language or logic of the case to so restrict its applications. Other circuits have extended its rationale to sporadic as well as seasonal employment." Citing *Whiting Corp.* v. *NLRB*, 200 F. 2d 43 (7th Cir. 1952); *Marlin-Rockwell Corp.* v. *N.L.R.B.*, 116 F. 2d 586 (2nd Cir. 1941), *Cert. den.*, 313 U.S. 594. (Appendix A, infra, p. 7a) (Brackets added).

REASON THE WRIT SHOULD BE GRANTED

1. The decision of the Court of Appeals goes far beyond the decided cases pertaining to the eligibility of former employees to vote in union representation elections. The Court below quoted from the landmark case of *Marlin-Rockwell Corp.* v. *NLRB*, *supra*:

> "A man who is laid off with reasonable expectation of being called back as soon as the employer's business picks up may well be concerned in the working conditions to which he will probably return and feel a lively interest in the selection of a collective bargaining representative. It is not unreasonable to include such a man in the voting unit." Id. at 588.

Your petitioner certainly recognizes this statement as a long accepted principle in determining the eligibility of voters. Its reasoning is sound. Likewise, the case of *NLRB* v. *Whiting*, *supra*, expresses the same principle, and these are the two cases cited by the Court below in rendering its judgment. Moreover, petitioner does not assert that the Jones Sausage case is limited to seasonal employment in its application. But none of these cases dealt with workmen drifting to many employers within an industry dependent upon specific contracts for specific dredging jobs. When the record shows that the challenged voters followed this pattern, and indeed, in some instances worked for other employers most of the time, then it is respectfully stated that the Court of Appeals has held that the challenged voters had a permanent reasonable expectation to be employed by all the employers in the industry for whom they worked sporadically. This is an anadomy and certainly goes far beyond the rationale of the "reasonable expectation for reemployment" doctrine quoted above from the Marlin-Rockwell case. In essence, the Court of Appeals has extended the law to permit the unionizing of an entire industry under the guise of reasonable expectation for reemployment at a reasonable time in the future. In doing so, it is respectfully submitted that the Court below committed error. Also, it is an important subject upon which this Court has not expressed itself.

2. The record in the Court below and before this Court is characterized by the subjective intent of the challenged voters rather than an objective approach to reasonable expectation for reemployment of former employees. The National Labor Relations Board overruled the challenges to voters in some instances and

sustained them in other instances, although the circumstances surrounding the eligibility of many of the former employees to vote were identical. Some of the challenged voters said they were available to work for Atkinson although they were regularly employed elsewhere. Petitioner urged the Court below not to adopt the standard, or lack of standard, that the desire or even the subjective intent of former employees creates a reasonably expectation for reemployment at a reasonable time in the future.

This would be tantamount to declaring that there is no objective standard whatever to the "reasonable expectation" test. The practical effect of such a holding should be evident. It is petitioner's position that this is precisely the ruling of the Board which was upheld by the Court of Appeals. The Court below does not comment upon this argument of petitioner. And yet there is no other explanation for the Board upholding the challenges of Bert Robertson, Graham Smith and Jerry Harrelson, whose last day of employment was April 29, and overruling the challenges of Hugh Brown, Willie Brown, Donnie Gillikin, Hampton Leonard, Eldred Robertson, S. D. Sellers and R. C. Dixon, whose employment also terminated on April 29, 1961. All of these men voted challenged ballots in the election and the record in the case shows the basic facts pertaining to Atkinson's employment of these men to be identical.

It is respectfully submitted that the record in this case shows that the employer does not know when, where, or if workers will be needed, and that the workers themselves recognize this fact. That is the nature of the business as shown by the record. The Board in its decision on the charge of an unfair labor practice may have necessarily reaffirmed its decision

in the representation case as stated by the Court of Appeals. However, petitioner's offer of proof relating to the representation case in the hearing on the unfair labor practice charge was denied (TR. Vol. 1, pp. 18, 132).

It is respectfully submitted that the Court below did not give the kind of scrutiny to the record before the National Labor Relations Board as required by this Court, and that the order of the Board does not rest upon adequate proof. *N.L.R.B. v. Universal Camera Corp.*, 340 U.S. 474 (1950).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1964